IN THE HIGH COURT OF JUDICATURE FOR
RAJASTHAN AT JODHPUR

JUDGMENT

Collector of Central Excise, Jaipur-II. **VS.** M/s Jupiter Industries & Anr.

D.B. OTHER TAX REFERENCE CASE NO.28/2004

Date of judgment : 7th April, 2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE R.P. VYAS

Reportable

Mr. V.K.Mathur for the petitioner.
Mr. Dinesh Mehta for the respondent.

BY THE COURT:- (Per Hon'ble Mr. Rajesh Balia, J.)

Heard learned counsel for the parties.

In this reference, the following question has been referred by the Central Excise and Gold Control Appellate Tribunal for decision by this Court as per the direction of this Court vide order dated 14.7.2003 in D.B. Civil Tax Reference Petition No.4/2003:-

> "Whether the CEGAT can allow refund under section 11B of Central Excise Act, 1944 when it was specifically not allowed by the sub rule (2) of the rule 96ZB of Central Excise Rules, 1944?"

The facts leading to this reference are that the respondent assessee is engaged in the manufacturing of stainless steel pattas/patties which are subject to Central Excise Duty under Chapter 72 of the Central Excise and Tariff Act. The Question relates to levy of duty by the Revenue for the period of 3 months commencing from 1st June, 1998 to 31st August, 1998 as compounded duty in respect of cold rolling machines which were ceased to operate w.e.f. 29th May, 1998 and were not in operation at any time during the said period.

The respondent-assessee had two cold rolling machines for processing the aforesaid articles. Under Chapter E-VI of the Central Excise Rules 1944 for manufacturing of stainless steel pattas and patties the assessee availed the special

procedure for levy of duty as envisaged thereunder. The Chapter E-VI of the Rules of 1944 contained the provisions from 96 ZA to 96 ZGG. This special procedure can be availed by the assessee in lieu of the provisions contained in the rules elsewhere for the period in respect of which the application is granted by the Commissioner.

The application made by the assessee under Rule 96 ZA had been granted by the Commissioner and the assessee was availing the special procedure for payment of duty as per the said procedure for the period, the permission was granted, which has not expired. The assessee was permitted to avail the special procedure for payment of duty.

Under Chapter 96 ZB, the duty is to be determined at the rate fixed per month or per year for each cold rolling machine as notified by the Central Government in this regard. Such rate is to be determined having regard to the average

production of the stainless pattas/patties falling under Chapter 72 of the Schedule of Central Excise Tariff Act, 1985 per month or per year and other relevant considerations by the Central Government and as by notification in the official gazette such rates were determined from time to time.

One of the two cold rolling machines in respect of which the assessee was availing special procedure for payment of duty in terms of the Rules 96ZB was dismantled on 29th May, 1998, after intimating the Commissioner and seeking his approval. After 29th May, 1998, only one cold rolling machine was in operation, thus, during the period in question only one cold rolling machine came to be operated for production, for which the assessee was to pay duty as per the special procedure.

In the aforesaid circumstances, the assessee contended that w.e.f. 1.6.1998, he was liable to pay compound duty only in respect of one cold rolling machine which was in operation, at the

rate prescribed at the relevant time for per month per machine.

However, the competent authority was of the opinion that the assessee was required to pay Duty for 3 successive months even after the removal of one cold rolling machine at the compound rate in terms of sub-Rule (2) of Rule 96 ZB read with Rule 96AC and he, therefore, called upon the assessee to pay additional duty on that premise. The assessee paid such duty under protest but challenged the levy of such duty and applied for refund of such duty paid in excess by him.

The Assistant Commissioner, Central Excise vide his order dated 24.2.1999 rejected the refund claim. Against the order of Commissioner dated 24.2.1999, an appeal was preferred by the Assessee which was dismissed on 18.11.1999 holding that the same is payable under Sub-Rule 96ZB and the amount shall be calculated by the application of such rates to the maximum number of

cold rolling machines installed by or on behalf of such manufacturer at one or more premises at any time during 3 calender months immediately preceding the calender month in which the application under Section 96 ZC is made. He was, on that basis, of the opinion that the provisions of Section 96ZB is very clear and does not give any power for calculating the aforesaid duty only on the actual number of machines installed and working during the period.

On further appeal, the Tribunal vide its order dated 8.8.2001 upheld the contention of the assessee and allowed the appeal and directed the refund of amount paid for the period during which the machine was not in operation. The Tribunal opined that none of the Rules under Chapter E-VI contemplates charge of duty after the machine has been dismantled and production of that machine is discontinued and there is no bar also contained in the special procedure as per rules or in Section 11B prohibiting refund of excess duty paid by an

assessee working under the Special Procedure Rules. The Tribunal was of the opinion that since in the present case, there is no dispute that the machine was dismantled on 29.5.1998 and found that despite the duty was ordered to be paid in respect of the dismantled machine for 3 months i.e. June 98 to August 98, this payment was clearly in excess of the sum payable under Compounded Levy Scheme. That amount is refundable in terms of Section 11B of the Central Excise Act. The Lower Authorities were in error in holding that the refund was not permissible in terms of Rules relating to Special Levy. Therefore, the orders denying the refund are required to be set aside.

Against this order of the Tribunal, the Revenue has preferred an application under Section 35H seeking reference of the question of law arising from the order of the Tribunal and the aforesaid question was directed to be referred for decision by this Court as noticed by us above.

We have heard the rival contentions. The Rule 96ZA enables a manufacturer, who subjects stainless steel pattas/patties falling under Chapter 72 to processing with the aid of cold rolling machine to make in the proper form an application to the Commissioner in this behalf. The special provision contained in this connection enables a manufacturer to subject stainless steel pattas/patties falling under Chapter 72 to make an application to the Commissioner to avail the special procedure for payment of duty on such stainless steel pattas/ patties processed by him provided under Chapter E-VI instead of paying duty as per the other provisions of the Act and Rules. On application being granted, the persons became entitled to discharge his liability to pay duty in terms of the special procedure in relation to stainless steel pattas/patties so processed by him with the aid of cold rolling machine.

The special procedure envisaged under Rule 96ZB is that having regard to the average

production of stainless steel pattas/patties falling under Chapter 72 in India per month or per year for cold rolling machines installed for processing of stainless steel pattas / patties and considering other relevant factors, the Central Government may, by notification in the Official Gazette, fix, from time to time, the rate of duty per month or per year, per each such cold rolling machines, subject to such conditions and limitations hereafter laid down, and if a manufacturer whose application has been granted under Rule 96ZA pays a sum calculated according to such rate of duty in the manner and subject to the conditions and limitations hereinafter laid down, such payment shall be in full discharge of his liability for duty leviable on his production of such cold re-rolled stainless steel patties or pattas during the period for which the said sum has been paid.

Apparently, the rate of levy of excise duty in respect of stainless pattas/patties subjected to cold processing by the cold rolling machines is determined on the average production of per

machine. It is indicative of the fact that the total production instead of being measured on actual terms is measured on estimated basis per machine. Thus, under the special procedure the excise duty is levied on the processing or manufacture of stainless steel pattas/patties of a given quantity per machine and retain the basic character of excise duty leviable on the manufacture of goods. The measure of manufactured articles, as per the special procedure is determined on the basis of estimated manufacture per machine and accordingly, levy is also payable on estimated manufactured articles per machine at the prescribed rate for such manufactured articles per machine for a given period but the rate is applicable to the production of article by the machine concerned. It is not de-linked. Sub-Rule (2) on which the reliance has been placed by the Revenue to claim that excise duty is leviable in respect of cold rolling machines which was not in existence during the period by dint of rules reads as under:-

"(2) The sum payable under sub-rule (1) shall

> be calculated by application of such rate to the maximum number of cold rolling machines installed by or on behalf of such manufacturer in one or more premises at any time during three calendar months immediately preceding the calendar month in which the application under Rule 96ZC is made."

Apparently, Sub-Rule (2) of Rule 96ZB cannot be read independent by sub-rule (1) of Rule 96ZB. Thus read in all cases whatever may be situation, the tax is to be levied on the basis of maximum number of cold rolling machines installed and operated by and on behalf of such manufacturer in immediately preceding three calendar months. If that were so, the expression, immediately preceding three calendar months in which that application is made, the rule may become redundant. Rule 96ZC reads as under:-

> "Rule 96ZC. Manufacturer's declaration and accounts.- (1) Such manufacturer shall, at any time during the calendar month

immediately preceding any month or part thereof, as the case may be, in respect of which he has been permitted to avail himself of the provision of this section, take an application to the proper offer in the proper Form for leave to remove stainless steel patties or pattas, or aluminium circles from his premise during the ensuing month, declaring therein the maximum number of cold rolling machines installed by him or on his behalf, in one or more premises at any time during the calendar months immediately preceding the said calendar month.

(2) If such application is not made to the proper office within the time limit laid down in sub-rule (1), the manufacturer shall, unless, otherwise directed by the Commissioner, and in exceptional circumstances, be liable to pay duty on his entire production of stainless steel patties or pattas, or aluminum circles during the month or part thereof in respect of which the application was to be made, at the rate prescribed in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) read with any relevant notification or notifications issued under sub-section (1) of Section 5A of the Act.

> (3) Such manufacturer shall also intimate the proper officer in writing of any proposed change in the number of cold rolling machines installed by him or on his behalf, and obtain the written approval of such officer before making any such change."

The scheme of Rule 96ZC is clear, if it is read in the context of principal charging section of parent Act.

Under section 3 of the Central Excise Act there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods which are produced or manufactured in India. Section 4 provides that where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall subject to other provisions of this section be deemed to be the normal price thereof at which goods are ordinarily sold by the assessee to a buyer in the course of delivering at the time and place of removal of

excisable articles. The excise duty is payable on the removal of goods from the place of manufacture or from the place where they are permitted to be stored at the rate specified for levy of excise duty at any particular article in terms of relevant provisions of law. In other words, the levy of duty on removal of goods to be measured on the quantity of goods removed each time at a rate applicable to such goods at the relevant date and in this process, the entire manufactured goods so removed from the place of manufacture or the permitted store house is subjected to the prescribed rate of duty on the basis of quantification of measure by applying the rate to the full quantity as such.

Section E-VI of rules makes a deviation in terms by adopting the levy at a rate on estimated production per machine per month. Special provision for discharging the obligation to the duty is made applicable only with effect from the date the permission is granted.

Apparently, the cases in which the plant and machinery is installed prior to making of an application provided under chapter E-VI, Rule 96 AC makes a provision in respect of goods that has already come into existence. Rule (1) clearly postulates the levy of duty in respect of goods which had already come into existence upto the date with effect from which the special procedure for payment of excise duty becomes applicable. It shows in no uncertain terms that if a manufacturer desires of availing the benefit of special procedure for payment of duty has to make an application during the calender month immediately preceding or part thereof as the case may be in respect of which he has been permitted to avail of the provisions of the special procedure for levy, he is required to remove stainless steel pattas/patties already processed from his premises during the ensuing month declaring therein the cold rolling machines installed by him or on his behalf at one or more premises at any time immediately preceding the said calendar month.

Rule 96AC (1) applies at the stage when the application is made for seeking permission to avail provision of Section E-VI. In other words, it relates to first month with which the period begins to be governed by the provisions of the payment of duty under special provision contained in Chapter E-VI. This is further clear from Sub-Rule 2 that if such application is not made in time ordinarily the manufacturer is liable to pay duty on stainless steel pattas/patties as the case may be during the month or part thereof in respect of which the application has been made at the rate prescribed in the schedule to the Central Excise Tariff Act, 1985 read with any notification relating to under subject matter. Thus, in the absence of proper application made for removal of stainless steel patties/pattas or other articles in advance, the entire manufactured article is subjected to payment of duty as per the regular duty and not under the special procedure. Sub Rule (1) which requires making of application does not deal with making an application for removal of one or more machines from the existing premises. The

Sub-Rule (3), which deals with the change in number of cold rolling machines does not require any such specified application but only requires the manufacturer that he has to intimate the officer in writing of any change in the number of machines.

Apparently, the distinction has to be drawn in this context between requirement of application under Section 96ZC before removing the goods and the requirement of intimating the officer before removing the machine itself.

The application is in respect of removal of the manufactured articles from the premises whereas intimation only is needed in respect of change in machines installed in the factory premises. Apparently, the Assistant Commissioner as well as the Commissioner (Appeals) were under impression that application required under Rule 96 AC relates to removal of cold rolling machines whereas there is no such requirement of making such application in that regard.

It goes without saying that, if in any particular month, no machine is operated and no production had taken place, there cannot be any levy of excise Duty. The manufacture of goods is condition precedent for charging of excise duty without which no levy can be made. Therefore, the rule cannot be made to go beyond the scope of charging provision. On the undisputed premises that no production had taken place from the cold rolling machine which has been removed on 29th May, 1998. In other words, no production has been taken place in respect of cold roiling machine which ceased to operate before the first July, 1996, no review could have been allowed in respect of estimated production in that machine. This is the simple logic which prevailed with the Tribunal and in our opinion rightly. No contrary view can be taken from the reading of the Rules also. We are, therefore, of the opinion that the conclusion reached by the Tribunal was valid.

Moreover, when there is no production of any articles in relation to the machine which was not in existence, the question of passing on duty to consumers of existing goods can arise so as to require the invocation of principle of unjust enrichment to deny refund. Therefore, there is no justification for taking the view that since the tax has been paid under the special provision it is not subject to refund. Refund is a consequence of recovery of duty which is not leviable under the provisions of taxing statute or of excess payment of Duty. In given circumstances, such excess collection of Duty may be refused to be refunded, if it results in unjust enrichment because passing of duty to buyers of goods. It depends on furnishing satisfactory proof by the manufacturer that such duty has been passed on to buyers. However, in case like the present where goods have not at all been manufactured and yet on estimated basis of imaginary production Duty has been demanded, the question of passing of such duty collected from the assessee to buyers of the non-existence production

cannot arise.

We are, therefore,, also of the opinion that the direction of the Tribunal to refund excess amount received in respect of machine which had ceased to function during the month of July to August also does not call for any interference. Consequently, the question referred to us is answered affirmative that is to say in favour of the assessee and against the revenue. There shall be no orders as to costs.

[R.P. VYAS], J. [RAJESH BALIA], J.

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